

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of THOMAS E. MANSON and DEPARTMENT OF JUSTICE,  
DRUG ENFORCEMENT AGENCY, Washington, DC

*Docket No. 99-1474; Submitted on the Record;  
Issued September 22, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's compensation claim on the grounds that he did not establish that his claim was filed within the applicable time limitation provisions of the Federal Employees' Compensation Act.

Appellant, then a 65-year-old retired special agent, filed a notice of occupational disease and claim for compensation on December 31, 1996 alleging that he gradually developed a hearing loss as a result of over 20 years of federal employment. He alleged in a statement that he began his career in 1962 as a special agent for the U.S. Customs Service until July 1, 1973 when he was reassigned to the employing establishment where he worked until he voluntarily retired in January 1985. Appellant stated that in the early sixties, his position required frequent practice and qualification exercises of weapons, for two to three hours at a time, in an indoor range where there were no baffles between shooters, nor any acoustical materials in the walls or ceiling for noise. He stated further that, at various times, he fired a range of firearms including automatic weapons and submachine guns. Appellant explained that ear protection was not made available until 1981 or 1982, when it became standard practice to make available such protection at range sites.

By letter dated September 11, 1997, the Office requested information from appellant's employing establishment, including medical examinations pertaining to hearing or ear problems and audiograms performed during appellant's employment to establish that it had knowledge of appellant's hearing loss prior to his retirement.

On March 9, 1998 the Office received a letter from appellant's employing establishment advising that because the Drug Enforcement Administration (DEA) it was not established until three years after appellant indicated knowledge of his hearing loss, his records would have to be retrieved from the federal records center. On July 28, 1998 the DEA's Employee Relations Specialist informed the Office that the employing establishment was in the process of obtaining medical records and medical examinations pertaining to hearing or ear problems from its health unit.

The Office in an undated letter informed appellant that it was returning his claim form to complete the date of injury and other specified information on the back of the form. The form was subsequently completed and returned to the Office. Question number 11, date you first became aware of disease or illness, contained whiteout with “O/A January 1, 1970” as the answer. Similarly, question number 12, date you first realized the disease or illness was caused or aggravated by your employment, contained whiteout and also noted the answer as “O/A January 1, 1970.”

By decision dated August 3, 1998, the Office denied appellant’s claim on the grounds that he had not timely filed his claim as required by the Act. The Office found that written notice of an injury was not given until December 31, 1996 and that appellant was last exposed to the noise claimed to have caused his injury in January 1985. The Office determined that appellant should have reasonably been aware of a relationship between his employment and the claimed condition by January 1985. The Office concluded that the evidence submitted was insufficient to establish that either his immediate supervisor or employing establishment had any knowledge that he sustained a work-related hearing loss at the time of his retirement.

By letter dated February 9, 1999, appellant requested reconsideration of the August 3, 1998 decision and submitted additional evidence. Among other documentation, he submitted a medical report of an employing establishment physical by Dr. Brian A. Zalis, dated September 12, 1980. This physical evaluation revealed hearing acuity as follows: Right 15/15; Left 15/15; and no significant loss of hearing. Also submitted was an audiogram dated October 21, 1998 and physical examinations and laboratory tests performed by the Miami Lakes Medical Center and the medical facility at appellant’s employing establishment between August 21, 1979 and October 5, 1984.

By decision dated March 2, 1999, the Office denied appellant’s request for reconsideration of the August 3, 1998 decision on the grounds that appellant had failed to provide sufficient medical and factual evidence to support that his claim was timely filed within the meaning of the Act.

The Board finds that this case is not in posture for decision.

Section 8122(a)<sup>1</sup> of the Act provides that an original claim for compensation for disability or death must be filed within three years after the injury or death, unless the immediate superior had actual knowledge of the injury or death within 30 days, which knowledge must be such to put the immediate superior reasonably on notice of an on-the-job injury or death, as provided by 5 U.S.C. § 8122(a)(1), or written notice of injury or death was given within 30 days. Section 8122(b)<sup>2</sup> provides that, in latent disability cases, the time limitation does not begin to run until the claimant is aware or by the exercise of reasonable diligence should have been aware, of the causal relationship between the employment and the compensable disability.

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<sup>1</sup> 5 U.S.C. § 8122(a).

<sup>2</sup> 5 U.S.C. § 8122(b).

In the instant case, appellant stated that he was exposed to loud noise for 23 years until he retired in January 1985 and that he was not aware that he had suffered a degenerative hearing loss as a result of his employment until January 1, 1970. He alleged that from the mid 1970's to the present, he had been experiencing hearing problems with increasing severity; however, he did not file a claim for compensation until December 31, 1996.

The Office did not rely on appellant's apparent confusion and statements that he first realized that he suffered a hearing loss on or about January 1, 1970 and related it to his employment on the same day. Instead, the Office relied on the latent disease provision of section 8122 (b) of the Act and extended the date of apparent awareness on appellant's part to the date of his retirement from the employing establishment in January 1985.

The Office denied appellant's claim in an August 3, 1998 decision in which it indicated that his last exposure occurred on or about January 1985 and that he reasonably should have been aware of a relationship between his employment and his hearing loss by January 1985. On March 2, 1999 the Office conducted a merit review of appellant's claim based on new evidence, and found that appellant failed to show that he had an audiogram that revealed a hearing loss or that a supervisor had actual knowledge that appellant had sustained a hearing loss attributable to his employment.

The Office stated that appellant was last exposed on or before 1985, but that written notice of the injury was not given until December 1996 and that appellant should have been aware of a relationship between his employment and his hearing loss by January 1985. Although appellant's subsequently modified CA-2 form, which indicated in block 11 that he first became aware of his illness or disease on or about January 1, 1970 and in block 12, which indicated that he first realized his disease or illness was related to his employment on or about January 1, 1970, the Office did not rely on this information in either its August 3, 1998 or March 2, 1999 decisions or use these dates in finding that appellant filed his claim untimely. Neither did the Office identify the factual or medical evidence it relied on in reaching its conclusion that appellant's claim was untimely filed.

The Office also did not explain in its March 2, 1999 or August 3, 1998 decisions why appellant reasonably should have been aware of a relationship between his employment and his claimed hearing loss by January 1985. In this connection, the record discloses that appellant underwent a drug enforcement physical examination on September 28, 1980. This physical examination revealed hearing acuity in both ears of 15/15 with a finding of no significant hearing loss. Therefore, despite appellant's reference to a hearing loss and his awareness of the same on January 1, 1970, the medical evidence of record simply fails to reveal any hearing loss prior to September 28, 1980. This medical report raises questions on the validity of the subsequently filled in date of "O/A January 1, 1970."

Because the Office's decision that appellant's claim was untimely filed rests on the premise that appellant was aware or reasonably should have been aware by January 1985 that his hearing loss was related to his employment and that time began to run beginning January 1985, it is necessary that the Office identify the specific medical or factual evidence in this record that reveals a hearing loss that the Office relied on to determine that appellant reasonably should have

been aware of a relationship between that hearing loss and its relationship to his employment by January 1985.

The decisions of the Office of Workers' Compensation Programs dated March 2, 1999 and August 3, 1998 are hereby set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, DC  
September 22, 2000

Willie T.C. Thomas  
Member

A. Peter Kanjorski  
Alternate Member

David S. Gerson, Member, dissenting:

The issue before the Board is whether the record supports that appellant filed a timely claim.

The record contains compelling evidence that appellant, a special agent for the Customs Service and then for the employing establishment, knew of the relationship between his hearing loss and his employment as far back as 1970 which the majority recognizes that the case record contains a "modified CA-2 form, which indicated in block 11 that he first became aware of his illness or disease on or about January 1, 1970 and in block 12 which indicated that he first realized his disease or illness was related to his employment on or about January 1, 1970...." Appellant reported that he participated in frequent firearms practice for hours at a time, that hearing protection was not provided until 1982 and that he experienced temporary periods of partial deafness after the firearms sessions.

However, rather than evaluating the evidence of record, the majority simply finds that the Office did not rely on the above evidence, *i.e.*, "The Office did not rely on this information in

finding that appellant filed his claim untimely.” The majority therefore remands the case for further unspecified action.

The Board, in its *de novo* review capacity, has the responsibility to review and consider all evidence of record in arriving at its conclusion. Whether the tribunals below accurately explain the reasons for their conclusions or specify all of the evidence upon which they rely, which they are generally required to do, the Board is nevertheless charged with the final review of claims arising under the Federal Employees’ Compensation Act. In arriving at its decision in this case, the majority chooses to recognize, but not weigh or analyze, evidence of record which directly impacts on the result in this claim. Rather, the majority simply finds that the Office did not “identify the specific medical or factual evidence in this record” upon which it relied. I consider that the Board must analyze and weigh such evidence and arrive at a conclusion and I would not shirk that responsibility.

My *de novo* review of the evidence of record, specifically the CA-2 referred to above as well as the nature of the employment, employment rank of appellant and his reported hearing loss experiences, leads me to the conclusion that appellant knew or certainly should have known as early as January 1970 that he had an employment-related hearing loss causally related to his employment. Appellant’s occupational disease claim, filed on December 31, 1996, was more than 11 years after his last date of employment which was in January 1985. I would find that the claim was untimely and not filed within the three-year period mandated by 5 U.S.C. § 8122. Accordingly, I would affirm the decision of the Office.

David S. Gerson  
Member